No. 18-431

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL, founded in 1958, is the only nationwide professional bar association for public defenders and private criminal defense lawyers. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files numerous amicus briefs each year, in this Court and others, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a

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[1] Both parties consented to the filing of this *amicus curiae* brief in support of Respondents. No counsel to a party in this case authored this brief in whole or in part. No party or party's counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief. No person or entity other than the *amicus* and its counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief.

fundamental interest in the equitable administration of the criminal justice system through clear laws that are properly applied in accordance with the Constitution, the will of Congress, and the decisions of this Court.

NACDL has a particular interest in this case because the government's proposed use of the canon of constitutional avoidance would undermine crucial and longstanding due process protections for criminal defendants.

SUMMARY OF ARGUMENT

The government argues that because this Court recently read 18 U.S.C. § 16(b) to require a categorical approach and to be unconstitutionally vague, this Court should read the materially *identical* words in 18 U.S.C. § 924(c)(3)(B) to mean something *different*. In support of this counterintuitive argument, the government relies on the canon of constitutional avoidance.

The use of constitutional avoidance that the government proposes is unprecedented, opportunistic, dangerous, and contrary to established principles of criminal law. The government has identified no case—and undersigned counsel is aware of none—in which this Court used constitutional avoidance to broaden rather than narrow a criminal statute. The government also has identified no case—and undersigned counsel is aware of none—in which this Court has used constitutional avoidance to avoid what the Court

already determined was the best reading of a materially identical statute.

The government's proposed use of constitutional avoidance would undermine the rule of law by encouraging arbitrary reinterpretations of vague language in criminal statutes. It also is irreconcilable with the well-established doctrines of fair notice and lenity, both of which safeguard the due process rights of criminal defendants and the separation of powers.

ARGUMENT

It is undisputed that "for many years," courts and the government have read section 924(c)'s residual clause to require the "categorical approach." Brief of the United States at 22. Just last Term, this Court confirmed that section 16(b)'s materially identical language is best read according to the categorical, ordinary case approach.[2] *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1217 (2018) (plurality opinion); *see also id.* at 1232 (Gorsuch, J., concurring in part and concurring in the judgment) (interpreting section 16(b) under the categorical, ordinary case

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[2] Apart from a comma after the word "that," sections 924(c)(3)(B) and 16(b) use identical language. *Compare* 18 U.S.C. § 924(c)(3) (a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"), *with id.* § 16(b) (a felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense").

approach partly because the Court's "precedent seemingly requires this approach"); *id.* at 1235-36 (Roberts, C.J., dissenting) (acknowledging that section 16(b) calls for the categorical, ordinary case approach).

It also is undisputed that, read to call for the categorical, ordinary case approach, the language of section 924(c)'s residual clause is unconstitutionally vague. *See* Brief of the United States at 23, 45. The government now argues that the Court should reinterpret that language. The government's argument depends on using the canon of constitutional avoidance in an unprecedented and unconstitutional way.

The government argues that, *because* the established reading of the residual clause "renders the statute unconstitutionally vague," the Court should discard that reading. *Id.* at 23. In support of this interpretive about-face, the government argues that the constitutional avoidance canon "requires" the Court to construe the residual clause "to incorporate" a case-by-case approach. Brief of the United States at 44.

In fact, the constitutional avoidance canon does not justify, let alone require, reinterpreting section 924(c)'s residual clause to provide for a case-by-case approach. To the contrary, application of constitutional avoidance here would be unprecedented, create a dangerous precedent, and violate principles of fair notice and lenity.

I. THE GOVERNMENT'S PROPOSED USE OF CONSTITUTIONAL AVOIDANCE WOULD BE UNPRECEDENTED

The canon of constitutional avoidance "is a tool for choosing between competing *plausible* interpretations of a statutory text." *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (emphasis added). It is "not a license for the judiciary to rewrite language enacted by the legislature." *United States v. Monsanto*, 491 U.S. 600, 611 (1989) (citation omitted); *see also Jennings v. Rodriquez*, 138 S. Ct. 830, 836 (2018) ("a court relying on" the canon of constitutional avoidance "must *interpret* the statute, not rewrite it"). It is not plausible to interpret section 924(c)'s residual clause as calling for a case-by-case approach, for the reasons detailed in Respondents' Brief. For that reason alone, the government's reliance on constitutional avoidance fails.

Even if the residual clause were fairly susceptible to the government's now-preferred construction, however, application of the constitutional avoidance canon according to the government's argument here would be unprecedented.

A. This Court Never Has Used Constitutional Avoidance to Broaden a Criminal Statute

This Court never has used the canon of constitutional avoidance to interpret a criminal statute to apply *more broadly*. The government's proposed use of the canon here—under which a

defendant would be subject to criminal penalties that would not be applicable under the "avoided" interpretation of the statute—is unprecedented.

When this Court has "saved" criminal statutes by reference to the canon of constitutional avoidance, it has done so by *narrowing* the scope of liability. One way the Court has narrowed otherwise vague statutes is by limiting to a readily definable core the conduct for which a defendant might be liable.

For example, in *Skilling v. United States*, the Court considered whether a statute criminalized a range of conduct wider than the "core" conduct that Congress obviously intended to criminalize. 561 U.S. 358 (2010). The Court held that the statute criminalized *only* that core conduct because "[r]eading the statute to proscribe a wider range of offensive conduct . . . would raise" constitutional concerns. *Id.* at 408.[3] Similarly, in *United States v. X-Citement Video*, the Court added an element to the most grammatical reading of the statute, effectively narrowing its scope in order to avoid constitutional concerns. *See* 513 U.S. 64, 78 (1994). In short, the Court has not used constitutional avoidance to expand the range of conduct that constitutes a crime or qualifies for increased punishment.

The four constitutional avoidance cases the government cites (*see* Brief of the United States at

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[3] The *Skilling* Court noted that the Court had "par[ed] down" federal statutes to avoid constitutional problems. 561 U.S. at 409 n.43; *see also id.* at 406 n.40 (collecting cases).

45, 48, 49) only demonstrate the unprecedented nature of its proposal here. In *United States ex rel. Attorney General of U.S. v. Delaware & Hudson Co.*, the Court used the canon to *reject* the government's broad reading of the statute, under which liability had been found. 213 U.S. 366, 407 (1909).

Similarly, in *Jones v. United States*, the Court rejected the government's construction of the federal carjacking statute—which would have permitted a term of imprisonment of up to 25 years—because that construction would have raised serious constitutional questions. 526 U.S. 227, 229 (1999). The Court held that "the better reading," especially "in light of" principles of constitutional avoidance, was the reading offered by defendants, under which only a 15-year maximum sentence was available. *Id.*

In *INS v. St. Cyr*, rather than adopt the government's interpretation of federal statutes as restricting habeas claims, the Court used the constitutional avoidance canon to afford *more protection* to certain resident aliens seeking federal court review. 533 U.S. 289, 299-300 (2001). Because reading the relevant statutes to mean that Congress had stripped courts of certain habeas jurisdiction would have raised "substantial constitutional questions," the Court applied the canon to reach the opposite result. *Id.*

Finally, in the fourth case the government cites on constitutional avoidance, this Court rejected the application of the canon altogether. *Jennings v. Rodriquez*, 138 S. Ct. 830, 836 (2018). The *Jennings* Court explained that the court below, purporting to

apply the canon, had impermissibly rewritten the statutory text.

In sum, the government asks this Court to use the canon of constitutional avoidance to broaden a criminal statute, but has identified no case in which this Court has done so. As even the cases cited by the government demonstrate, using constitutional avoidance this way would be unprecedented.

B. The Government's Proposal Would Broaden the Application of the Section 924(c) Residual Clause

Despite lacking supporting precedent, the government asks the Court to reinterpret section 924(c)'s residual clause to encompass a *broader* scope of conduct than it otherwise would. The government's proposal "would expand the reach of Section 924(c)(3)(B) to a new class of offenders—namely those offenders who commit offenses that do not 'ordinar[ily]' pose a 'substantial risk' of application of physical force against another, but which pose such a risk under the specific factual circumstances of the offender's case." *United States v. Simms*, 914 F.3d 229, 255 (4th Cir. 2019) (en banc) (Wynn, J., concurring).

This expansion would have a serious broadening effect, as Respondents' Brief (at pp. 40-43) explains. Perhaps most notably, every case brought under the residual clause already involves a specific fact at least arguably likely to pose a substantial risk: the use of a gun. *See Simms*, 914 F.3d at 255 (Wynn, J., concurring).

As a practical matter, using "a firearm, standing alone, will always suffice to generate" a "substantial risk of physical force" in a case-by-case analysis "regardless of the nature of the underlying offense." *Id.* at 247 (majority opinion). No instruction could keep a jury from applying evidence on one element—using a gun—to its evaluations of the other—substantial risk of physical force.[4] As a result, the expansion of the residual clause that the government proposes would do more than subject additional defendants to mandatory minimum sentences—though that in itself would be unprecedented. Expanding the scope of the residual clause "would in effect judicially repeal" Congress's legislative decision to limit section 924(c) to crimes of violence. *Id.*

C. This Court Never Has Used Constitutional Avoidance to Interpret Identical Language in Related Statutes to Mean Different Things, As the Government Has Proposed Here

The government's position also is unprecedented in another way. The government asks this Court to read as requiring a case-by-case approach the same

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[4] Even if a jury were instructed not to collapse these two elements, and to consider them separately, this is a "context[] in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135 (1968).

words that the *Dimaya* Court read to require a categorical approach. But the government has cited no case in which the Court used constitutional avoidance to construe language in one statute to mean something entirely different from what the identical language in a related statute means.

In fact, the Court consistently has rejected an approach to constitutional avoidance that "would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Clark*, 543 U.S. at 382. In *Clark*, the government argued—much as it does here—that "the statutory purpose and the constitutional concerns that influenced" the Court's earlier precedential construction of a statute were "not present" when the same language was applied to a different category of individuals, and so the Court should adopt a broader construction. *Id.* at 380. The Court forcefully rejected this "novel interpretive approach." *Id.* at 382. "To give the[] same words a different meaning" depending on the context in which they are applied, the Court observed, "would be to invent a statute rather than interpret one." *Id.* at 378.

Indeed, the Court has recognized that it should adhere to, not "reexamine," its "longstanding . . . construction" of statutory language. *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991); *see also Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is

appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

Neither the Courts of Appeals nor the government has identified any cases in which this Court used the canon of constitutional avoidance to avoid what it previously determined was the best interpretation of a materially identical statute. Rather, as the Fourth Circuit noted, this Court simply has not "done anything comparable" to what the government requests "in the name of constitutional avoidance." *Simms*, 914 F.3d at 252 (majority opinion).

II. THE GOVERNMENT'S PROPOSED USE OF CONSTITUTIONAL AVOIDANCE WOULD REDUCE THE CANON TO AN ARBITRARY TOOL WITH DANGEROUS RULE-OF-LAW IMPLICATIONS

Interpreting the same detailed language to mean different things in related statutes is unprecedented for a reason. The government's approach would have dangerous implications for the rule of law and would come at considerable cost to legal certainty.

The government's constitutional avoidance argument would turn "the rule against multiple interpretations" on its head, with the risk that "a statutory term . . . never [will] settl[e] on a fixed meaning." *In re Woolsey*, 696 F.3d 1266, 1277-78 (10th Cir. 2012) (Gorsuch, J.). That chameleonic approach to statutory interpretation, which this Court has rejected, *see Clark*, 543 U.S. at 382, "would leave citizens at sea, only and always

guessing at what the law might be held to mean in the unique 'fact situation' of the next case—a result in no little tension with the rule of law itself." *Woolsey*, 696 F.3d at 1277-78. In short, the government invites this Court to use constitutional avoidance to reject its own authoritative interpretation of materially identical statutory language and to revise the long-understood meaning of a statute "to meet the exigencies of each case coming before" the Court—but such an approach would "add only to the instability and uncertainty of the law." *Screws v. United States*, 325 U.S. 91, 113 (1945) (plurality opinion). If the Court were to revise the meaning of statutory language to avoid (rather than implement) previous decisions, what law applied in any given case would be deeply uncertain.

Indeed, beyond the specific language at issue here, the government's proposal would create broad uncertainty about the meaning of language in federal statutes. Whenever confronted with the same statutory language, even in related statutes, courts might presume—as the government asks this Court to rule here—not that Congress meant the same thing each time, but that each appearance of the language comes with a different meaning. And which statute means what could depend on which statute this Court happens to consider first.

This case illustrates the point. Sections 16(b) and 924(c) use materially identical language. The government concedes that, before *Dimaya*, there was no reason to read that language differently in one section than in the other—a necessary concession, since for decades the government has argued and

courts have decided (including in this very case) that it must be read the same way in both. *See* Brief for the United States at 22, 34. The government argues that, because section 16(b) has now been held unconstitutional, the interpretation of section 924(c) must change. But that logic, such as it is, applies equally well in reverse. If this Court first had held section 924(c)(3)(B) unconstitutional under the ordinary case approach, then according to the government's argument here, constitutional avoidance would "require" the Court to read section 16(b) to provide for a case-by-case approach in order to uphold it. In short, if the government's argument were accepted, then the result of *Davis* and *Dimaya* would be that, as between sections 924(c)(3)(B) and 16(b), one stands and the other falls based on the accident of timing. That is the epitome of arbitrary.

The government's proposed approach also would empower repeat litigants to engage in seriatim interpretations and re-interpretations of similarly worded statutes. A court's interpretation of a statute as unconstitutionally vague would make the meaning of similar statutes *less* certain, since the government could simply propose a new meaning in the next case—and if that were not held constitutional, still another meaning in the next. One repeat litigant that would particularly profit from this practice is the government. The practice would "sharply diminish Congress's incentive to draft a narrowly tailored law in the first place." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (citation omitted). Instead, the government's success here might encourage Congress to enact statutes

with ambiguous language, thereby allowing courts and the Executive to sort out their meaning through this game of constitutional-avoidance whack-a-mole.

The government does not and cannot offer any principled basis for an approach that would produce an outcome in which the constitutionality of similarly worded statutes depends on the order in which they are challenged. This Court should not tolerate that degree of arbitrariness in interpreting statutes. The government did not argue for—and this Court, in any event, rejected—the application of constitutional avoidance in both *Dimaya* and *Johnson*. *See Dimaya*, 138 S. Ct. at 1209-18 (plurality opinion); *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). The fact that the government now knows the Court views the categorical approach as unconstitutionally vague, and would like a different result, provides no sound reason to apply the constitutional avoidance canon in this case.

III. THE GOVERNMENT'S PROPOSED USE OF CONSTITUTIONAL AVOIDANCE IS IRRECONCILABLE WITH THE DUE-PROCESS RIGHT TO FAIR NOTICE

The right to fair notice, guaranteed by the Due Process Clause of the Fifth Amendment, is deeply rooted in American law. *See, e.g.*, *FCC v. Fox Television Stations*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("[W]e insist that laws give the person of ordinary

intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 46 (D.C. Cir. 2016) (Kavanaugh, J.) (emphasizing "the bedrock due process principle that the people should have fair notice of what conduct is prohibited"), *reh'g en banc granted, order vacated* (Feb. 16, 2017), *relevant portion of opinion reinstated on reh'g en banc*, 881 F.3d 75 (D.C. Cir. 2018). That right to fair notice includes being informed of "the consequences of violating a given criminal statute." *United States v. Batchelder*, 442 U.S. 114, 123 (1979).[5] Adopting the government's position in this case would do violence to that right.

The government's proposed case-by-case approach violates fair notice because the text of section 924(c)(3) gives clear notice that the residual clause in fact requires the categorical, ordinary case approach—as Respondents' Brief (at pp. 12-24) explains. Moreover, this Court's precedents confirm that similar language, and even materially identical language, establishes that approach. Just last year, this Court reiterated that materially identical language in 18 U.S.C. § 16(b) calls for the categorical, ordinary case approach. *See Dimaya*, 138 S. Ct. at 1209-16 (plurality opinion); *see also*

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[5] The injustice of using constitutional avoidance to construe criminal statutes against defendants without fair notice is further highlighted, in this case, by the harshness of the mandatory sentence enhancements under section 924(c). *See* 18 U.S.C. § 924(c)(1)(A).

Leocal v. Ashcroft, 543 U.S. 1, 7 (2004) (the text of section 16 "directs our focus to the 'offense' of conviction . . . . rather than to the particular facts"). Indeed, in *Dimaya*, a plurality of the Court determined that the case-specific approach is not even a *plausible* reading—let alone the best reading—of statutory language that is materially identical to section 924(c)(3). *See Dimaya*, 138 S. Ct. at 1217 (plurality opinion).[6]

This Court's precedent even before *Dimaya* compelled a categorical, ordinary case interpretation of the language in section 16(b), just as precedent compels that interpretation of the materially identical language here. In *Johnson v. United States*, this Court construed a similarly worded residual clause in the Armed Career Criminal Act—which imposed a sentence enhancement for a felony that "involves conduct that presents a serious

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[6] Justice Gorsuch concurred in the result, interpreting section 16(b) under the ordinary case approach partly because the Court's "precedent seemingly requires this approach." *Id.* at 1232 (Gorsuch, J., concurring in part and concurring in the judgment). Chief Justice Roberts likewise accepted that section 16(b) asks courts "to consider whether a particular offense, defined without regard to the facts of the conviction, poses a specified risk," and to look to "how those elements will ordinarily be fulfilled." *Id.* at 1235-36 (Roberts, C.J., dissenting). The Chief Justice argued in dissent, however, that section 16(b) "is not unconstitutionally vague even under the standard applicable to criminal laws." *Id.* at 1234. Notably, the Chief Justice also rejected a reinterpretation of the statute that "could have expanded the reach of the criminal provision—surely a job for Congress alone." *Id.* at 1240.

potential risk of physical injury to another"—to require a categorical, ordinary case approach. *See* 135 S. Ct. at 2563 (interpreting 18 U.S.C. § 924(e)(2)(B)). Congress knows how to instruct judges "to look into a felon's actual conduct"—"other statutes, in other contexts, speak in just that way." *Dimaya*, 138 S. Ct. at 1218 (plurality opinion) (citation omitted). Congress chose not to do so in section 924(c)'s residual clause, just as it chose not to do so in sections 16(b) and 924(e)(2)(B).

The government concedes that before *Dimaya*, both "lower courts and the government relied on this Court's decisions interpreting those other provisions to adopt a categorical approach to Section 924(c)(3)(B)." Brief for the United States at 34. Indeed, "the courts and the government have—with some difficulty—applied that approach for many years." *Id.* at 22. Moreover, "the government and the lower courts generally treated Section 924(c)(3)(B) analogously to similarly worded provisions in the ACCA's residual clause and Section 16(b)," the latter of which is "linguistically almost identical" to section 924(c)'s residual clause. *Id.* at 32, 39. Thus, the government itself not only interpreted the language at issue in *Dimaya* and *Johnson* to require the ordinary case approach, it also concededly construed the language at issue in *this* case to require that approach until just months ago. *See Dimaya*, 138 S. Ct. at 1217 (plurality opinion); *Johnson*, 135 S. Ct. at 2562; Pet. App. 4a. Yet it argues that section 924(c)'s residual clause should now be read differently, and the new reading applied against Respondents in this case, because

Dimaya both confirmed that the ordinary case approach applies to section 16(b) and held the statute unconstitutional under that approach.

The government's argument is plainly incompatible with any coherent concept of fair notice. As the government acknowledges, before *Dimaya* not only could a "person of ordinary intelligence" not have known that the case-specific approach applies, but also lower courts and the government itself had determined the opposite. *See* Brief for the United States at 34. If federal courts and the U.S. Department of Justice—with all their resources and extensive experience litigating and adjudicating section 924(c)(3)(B) cases—reasonably understood before *Dimaya* that the categorical, ordinary case approach applied, then *a fortiori* no ordinary citizen could have fair notice to the contrary.

Indeed, if the government's constitutional-avoidance argument were to prevail, consider what a "person of ordinary intelligence" would have to have known and understood in order to recognize that section 924(c) proscribes his conduct under a case-specific approach. Reading the statutory text, and even the judicial precedents interpreting that text, would not have helped, let alone sufficed. Rather, in order to recognize that section 924(c) covered his conduct, a citizen must have foreseen that the statutory language would be read to have one meaning in one context that would cause the materially identical language to be assigned a different meaning in his case.

The government's argument thus demands of ordinary citizens a level of predictive insight into the course of a statute's interpretation that is beyond the ken even of legal experts. But "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997).

What's more, the government turns fair notice inside out—reading the statutory text would only have led an ordinary citizen astray, since the very fact that the text of a materially identical statute is best read to adopt the categorical, ordinary-case approach (combined with a ruling that the statute is unconstitutional under that reading) becomes the predicate for reading that language differently in the next case. This Court has never before engaged in such a course of statutory interpretation, let alone required the public to engage in it *ex ante* to have the "fair notice" required by the Due Process Clause. Indeed, Justice Scalia once wrote that to charge the public "even with knowledge of Committee Reports" for fair-notice purposes "descends to needless farce." *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring) (citation omitted); *see also United States v. Hayes*, 555 U.S. 415, 437 (2009) (Roberts, C.J., dissenting) ("[A]n individual should not go to jail for failing to conduct a 50–state survey or comb through obscure legislative history."). The government's argument here—which would charge the public with knowledge of novel interpretations of statutory language based on application of

constitutional avoidance in the wake of intervening Supreme Court decisions interpreting that language in other statutes—descends even below farce, mocking the very concept of fair notice.

IV. THE GOVERNMENT'S PROPOSED USE OF CONSTITUTIONAL AVOIDANCE FUNDAMENTALLY IS AT ODDS WITH THE RULE OF LENITY

The government's argument that the Court should employ the constitutional avoidance doctrine to interpret section 924(c)'s residual clause in the government's favor also is inconsistent with the rule of lenity, which instructs that ambiguities in criminal statutes must be construed in the defendant's favor. This longstanding principle of construction safeguards the separation of powers as well as principles of fairness to defendants. For these additional reasons, the Court should reject the government's constitutional avoidance argument.

A. The Rule of Lenity Requires That Ambiguous Criminal Statutes Be Construed In the Defendant's Favor

The rule of lenity is a "venerable" principle of construction of criminal statutes which counsels strongly against the government's proffered construction of the section 924(c) residual clause. *R.L.C.*, 503 U.S. at 305 (plurality opinion); *see also* Intisar A. Rabb, *Appellate Rule of Lenity*, 131 Harv. L. Rev. F. 179, 181-82 (2018) (explaining that the rule "lies at the heart of interpretive questions in the criminal justice arena"). The rule is rooted in the

principle that criminal laws should be construed strictly. *See United States v. Wiltberger*, 18 U.S. 76, 95 (1820); *see also McBoyle v. United States*, 283 U.S. 25, 27 (1931); *United States v. Lawrence*, 3 U.S. 42 (1795) ("[W]henever a new remedy is so introduced, (more especially in a case so highly penal) it must be strictly pursued."); 1 W. Blackstone, Commentaries on the Laws of England 88 (1765) ("Penal statutes must be construed strictly."). Nearly two centuries ago, Chief Justice Marshall explained that "[t]he rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *Wiltberger*, 18 U.S. 76, 95.

This Court repeatedly has recognized the longstanding principle requiring that courts resolve "ambiguity concerning the ambit of criminal statutes" in the defendant's favor. *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (plurality opinion) (citation omitted); *see, e.g., Skilling v. United States*, 561 U.S. at 410; *United States v. Santos*, 553 U.S. 507, 519 (2008) (plurality opinion) ("We interpret ambiguous criminal statutes in favor of defendants, not prosecutors."); *United States v. Bass*, 404 U.S. 336, 347 (1971).[7] The Court has

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[7] In some cases, the Court has stated that "a *grievous* ambiguity or uncertainty" in the statute is required to trigger the rule, *Ocasio v. United States*, 136 S. Ct. 1423, 1434 n.8 (2016) (emphasis added) (citation omitted), and that the rule applies only when there is no other "satisfactory construction" of the statute, *Lockhart v. United States*, 136 S. Ct. 958, 968 (2016). *But see Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-09 (2003) (stating that "any ambiguity" triggers application of the *(cont'd)*

explained that when confronted with "two readings of what conduct Congress has made a crime, it is appropriate, before [the judiciary] choose[s] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).[8]

The rule of lenity applies equally in the sentencing context. *See, e.g., Hughey v. United States*, 495 U.S. 411, 422 (1990) (discussing "longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant," including a "federal statute that would enhance [the defendant's] penalty" (citation omitted)); *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (stating that the rule "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose"); *R.L.C.*, 503 U.S. at 305 (plurality opinion) (noting that in the sentencing context, the rule

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rule). Here, to the extent the government argues that the statute is sufficiently ambiguous to trigger the application of constitutional avoidance, that purported ambiguity undoubtedly is "grievous" insofar as the government proposes to give the language of section 924(c)'s residual clause a construction different from the materially identical language in section 16(b).

[8] The Court has articulated similar standards for lenity in other cases as well. *See United States v. Granderson*, 511 U.S. 39, 54 (2004) (rule of lenity applies unless the government's statutory interpretation is "unambiguously correct").

requires "choos[ing] the construction yielding the shorter sentence").

B. Application of the Rule of Lenity Is Necessary to Uphold the Separation of Powers and Protect Principles of Fairness

The rule of lenity also serves critical functions by safeguarding the separation of powers and fairness principles. The invasion of Congress's legislative role is particularly troubling in a criminal case. A fundamental principle of American criminal law since the Founding is that "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. at 95; *see Dowling v. United States*, 473 U.S. 207, 213 (1985) ("Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate." (citation omitted)); *Liparota v. United States*, 471 U.S. 419, 427 (1985) ("Application of the rule of lenity . . . strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability."). As the Court has explained, "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83-84 (1955). Thus, the rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Santos*, 553 U.S. at 514.

Furthermore, the rule of lenity promotes fairness and uniformity in the criminal justice system by protecting the right to fair notice of what conduct is prohibited and minimizing the risk that prosecutors, when armed with an ambiguous criminal statute, will enforce it selectively or arbitrarily. *See United States v. Kozminski*, 487 U.S. 931, 952 (1988). By applying the rule of lenity, judges "provide an institutional check on the political excesses that permit unclear laws, prosecutorial overreach, and infringements on liberty." Rabb, 131 Harv. L. Rev. F. at 188.

C. The Government's Constitutional Avoidance Argument Fundamentally Is at Odds With the Rule of Lenity and the Principles of Fairness Underlying the Rule

The government's proposed use of constitutional avoidance is at odds with the rule of lenity and effectively would turn that doctrine on its head. "[T]he canon of constitutional avoidance has no application in the absence of statutory ambiguity." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 494 (2001). Accordingly, that section 924(c)'s residual clause is ambiguous is a necessary premise of the government's constitutional avoidance argument. And if the statute is ambiguous, the rule of lenity weighs in favor of interpreting it in Respondents' favor. *See, e.g.*, *Wiltberger*, 18 U.S. 76; *Yates*, 135 S. Ct. at 1088; *Skilling*, 561 U.S. at 410; *Bass*, 404 U.S. at 347.

The government nevertheless urges the Court to construe *against* the defendant a purportedly ambiguous statute in order to save it by *broadening* its application. The Court should reject the government's gambit. As explained above, the Court has never used the doctrine of constitutional avoidance in this manner, and should not use it now to eviscerate the longstanding rule of lenity. *See Reynolds v. United States*, 565 U.S. 432, 442 (2012) (drawing upon principle that "the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered," in the face of the dissent's invocation of constitutional avoidance (citation omitted)); *Simms*, 914 F.3d at 257-58 (Wynn, J., concurring) ("[W]ere the judiciary to rely on constitutional avoidance to interpret a statute's breadth in a manner that extends beyond what the text 'clearly warrants'—as necessarily occurs when a court adopts a broad reading of an ambiguous statute—it would violate the due process principle of 'fair warning' undergirding the rule of lenity." (quoting *Hayes*, 555 U.S. at 436-37)). If courts faced with ambiguous criminal statutes begin to use constitutional avoidance to broaden them instead of using lenity to narrow them, then nothing remains of the venerable lenity doctrine.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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